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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TONI J. GUTHRIE,

Defendant and Appellant.

D074321

(Super. Ct. No. SCN384170)

APPEAL from a judgment of the Superior Court of San Diego County, Carlos O. Armour, Judge. Reversed and remanded with directions.

Raquel Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found Toni J. Guthrie guilty of violating a protective order (Pen. Code,¹ § 166, subd. (c)(1)). The jury also found true allegations the offense involved an act of violence and a credible threat of violence and she had four prior convictions for violating a protective order (§ 166, subd. (c)(4)).

The court suspended imposition of sentence and placed Guthrie on formal probation for three years, conditioned upon her serving 365 days in local custody. However, the court granted the probation department discretion to transport and release Guthrie to an appropriate residential treatment program after she served 300 days in custody.

Between Guthrie's conviction and the sentencing hearing, the Legislature enacted sections 1001.35 and 1001.36 (Stats. 2018, ch. 34, § 24), effective June 27, 2018, which authorize pretrial diversion for defendants with mental disorders (mental health diversion statutes).² Guthrie contends the mental health diversion statutes apply retroactively to this case. She requests we conditionally reverse and remand the matter to allow the court an opportunity to exercise its discretion under them.

¹ Further undesignated statutory references are also to the Penal Code.

² The Legislature subsequently amended section 1001.36, effective January 1, 2019, to eliminate diversion eligibility for defendants charged with certain specified offenses, to give the court the discretion to require defendants make a prima facie showing of diversion eligibility, and to give the court the authority to address restitution for victims of diverted offenses. (Stats. 2018, ch. 1005, § 1). All references to section 1001.36 are to this version of the statute.

The People contend Guthrie forfeited this contention by failing to raise it at the sentencing hearing, by which time the mental health diversion statutes had been in effect for two weeks. The People also contend the court was presumed to know of the existence of the mental health diversion statutes and Guthrie has not established the court abused its discretion by failing to apply them at the sentencing hearing.

We conclude the mental health diversion statutes apply retroactively to this case and Guthrie did not forfeit this contention. Accordingly, we reverse the judgment to allow the court an opportunity to exercise its discretion under the mental health diversion statutes.

II

BACKGROUND

A

Guthrie and the victim dated for three to four years and lived together for approximately three of those years. During that time, police arrested her for acts of domestic violence against the victim. Although the victim obtained multiple protective orders against Guthrie, the victim remained concerned about Guthrie's welfare and allowed her to briefly live at his home and keep her belongings there. However, he eventually asked her to move out of his home.

One week after moving out, Guthrie walked into the victim's home uninvited. He told her she needed to leave and she became upset. She claimed she did not have to leave because she owned half the home, even though she had no interest in it. When he told her he was going to call the police, Guthrie hit him on the top of his head with her fist.

He told her again she had to leave and grabbed his phone to call the police. She then kicked him in the groin, causing him to double over. The victim called 911.

As the victim was on the phone with the 911 dispatcher, the victim and his roommate corralled Guthrie near the front door and she kicked the victim in the groin again. The victim tried to guide her out of his home, but she clung to the front door jamb yelling, "This is my house. This is my house."

The victim or his roommate peeled her fingers off the door jamb. She then went outside and sat down on the front porch. The victim and his roommate locked the door after her and were collecting themselves when she started banging on the living room window while yelling and screaming at them.

When a police officer responded to the incident, Guthrie started to leave on her skateboard. The officer ordered her to stop and she complied. The officer believed she was under the influence of alcohol.

Guthrie told another police officer she was aware of the protective order. But, she was physically drawn to the victim's home by a magical spell and the victim's voice in her head.

B

The victim and Guthrie met in a rehabilitation facility. He believed she had been diagnosed with paranoid schizophrenia and did not have a full grasp of reality. She told him and she seemed to truly believe she was married to a well-known actor and to God. The victim believed her mental illness became more evident when she used alcohol.

III

DISCUSSION

A

Sections 1001.35 and 1001.36 authorize pretrial diversion for defendants with mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment" (§ 1001.36, subd. (c).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subds. (c)(1)(B) & (c)(3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (§ 1001.36, subd. (e).)

B

As a canon of statutory interpretation, we generally presume laws apply prospectively. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent. (*Ibid.*)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara, supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*).) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*Lara*, at p. 308.)

The *Estrada* rule applies to section 1001.36 because section 1001.36 lessens punishment by giving defendants the possibility of diversion and then dismissal of criminal charges. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review

granted Dec. 27, 2018, S252220.) In addition, applying section 1001.36 retroactively is consistent with the statute's purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

The statute's definition of pretrial diversion, which indicates the statute applies at any point in a prosecution from accusation to adjudication (§ 1001.36, subd. (c)), does not compel a different conclusion. "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791.)

Furthermore, we note the California Supreme Court decided *Lara* before the Legislature enacted section 1001.36 and the Legislature is deemed to have been aware of the decision. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 897.) Had the Legislature intended for the courts to treat section 1001.36 in a different manner, we would expect the Legislature to have expressed this intent clearly and directly, not obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].) Consequently, we conclude section 1001.36 applies retroactively to this case.

C

Contrary to the People's assertion, Guthrie has not forfeited this contention. A defendant may forfeit a right in a criminal case by failing to timely assert the right before the tribunal with jurisdiction to determine it. (*People v. Trujillo* (2015) 60 Cal.4th 850, 856.) "However, neither forfeiture nor application of the forfeiture rule is automatic. [Citation.] Competing concerns may cause an appellate court to conclude that an objection has not been forfeited. [Citations.] Similar concerns may also cause an appellate court to refrain from applying the forfeiture bar. [Citation.]" (*People v. McCollough* (2013) 56 Cal.4th 589, 593.)

In this case, the mental health diversion statutes were enacted and took effect on the same day, which was about a month after Guthrie's conviction and two weeks before her sentencing hearing. At the sentencing hearing, defense counsel argued for a disposition that would provide Guthrie with community-based mental health and substance abuse treatment and preclude her from having a felony conviction on her record. However, neither defense counsel in her arguments nor the court in its sentencing decision referenced the mental health diversion statutes. The prosecutor also did not reference them in countering defense counsel's arguments.

Given the similarities between the relief sought by defense counsel and the relief provided by the mental health diversion statutes, it is difficult to conclude Guthrie relinquished her right to seek the relief provided by the statutes. Rather, we may reasonably infer from the omission of any reference to the statutes at the sentencing hearing that neither counsel nor the court was aware of the statutes at the time. Courts

generally decline to apply the forfeiture rule to a right derived from recent, unanticipated changes to the law. (See *People v. Edwards* (2013) 57 Cal.4th 658, 705; *People v. Black* (2007) 41 Cal.4th 799, 810; *People v. Turner* (1990) 50 Cal.3d 668, 703.) We decline to do so here.

D

The preceding conclusions do not end our inquiry. Effective January 1, 2019, section 1001.36 provides, "At any stage of the proceedings, the court *may* require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." (§ 1001.36, subd. (b)(3), italics added.) Based on this provision, the People contend remanding the case to allow the court to exercise its discretion under the mental health diversion statutes is unwarranted because Guthrie has not established she has or can make the requisite prima facie showing.

We find this contention unpersuasive for two reasons. First, the prima facie showing provision is discretionary, not mandatory. Second, the purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2 [the prima facie showing

provision "[a]uthorizes a court to request a prima facie hearing where a defendant must show they are potentially eligible for diversion"].)

Here, there is evidence Guthrie suffers from a mental illness that causes delusions and the delusions prompted her to violate the protective order. The court recognized the existence of Guthrie's mental illness, finding a defense psychological evaluation of her to be "right on point." The court also recognized Guthrie needed mental health treatment. Consequently, the court recommended she be screened by the probation department's behavioral health unit and authorized the probation department to transport and release her to an appropriate residential treatment program after she served 300 days in custody. These portions of the record establish Guthrie's potential eligibility for mental health diversion.

Whether the court will be satisfied Guthrie's mental disorder was a significant factor in her violation of the protective order, whether a qualified mental health expert will believe Guthrie's symptoms will respond to treatment, and whether the court will be satisfied treating Guthrie in the community will not pose an unreasonable risk of danger to public safety are questions not answered or capable of being answered at this juncture. Guthrie has not had an opportunity to develop the requisite expert evidence and the court has not had an opportunity to consider whether she would be an appropriate candidate for mental health diversion. By remanding the matter, which we conclude is the most appropriate course, both Guthrie and the court will have these opportunities.

IV

DISPOSITION

The judgment is reversed. The cause is remanded to the superior court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines Guthrie qualifies for diversion, then the court may grant diversion. If Guthrie successfully completes diversion, then the court shall dismiss the charges.

If the court determines Guthrie is ineligible for diversion, or Guthrie does not successfully complete diversion, then the court shall reinstate Guthrie's conviction, conduct further sentencing proceedings as appropriate, and forward a certified copy of the resulting abstract of judgment to the appropriate corrections agency.

McCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

DATO, J.